No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER and STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG *
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

* Counsel of Record

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petitioners, St. Mary's Honor Center and Steven Long.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community. An important

[1] Both petitioners and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *International Union v. Johnson Controls*, —— U.S. ——, 111 S.Ct. 1196 (1991), and *Hazen Paper v. Biggins*, No. 91-1600 (U.S. *amicus* brief filed Aug. 6, 1992).

As potential respondents to charges of employment discrimination, the Chamber's members have a vital interest in how disparate treatment cases, like the case below, are proved. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985), this Court articulated a three-step process for proving cases of intentional employment discrimination. That model prescribes the following system of proof: (1) the plaintiff must establish a *prima facie* case of disparate treatment, creating a presumption of discrimination; (2) the defendant can then rebut the presumption by articulating legitimate, nondiscriminatory reasons for the employment action; (3) the plaintiff then has the burden of demonstrating that the employer's articulated reasons are a "pretext for discrimination." The proper construction of the third—pretext for discrimination—step of the *McDonnell Douglas/Burdine* model is at issue here.

It is axiomatic that plaintiffs bear the burden of proof in employment discrimination cases. The Eighth Circuit's interpretation of the third step of this Court's model of proof essentially eliminates the plaintiff's ultimate burden of proving a case of intentional discrimination. By allowing a plaintiff merely to discredit the legitimate, non-discriminatory reasons given by the employer for its

employment action, without also showing that the employer's "real reasons" were discriminatory, the Eighth Circuit has severely short-circuited this Court's careful allocation of proof in employment discrimination cases.

Pretext for discrimination means more than merely discrediting the employer's articulated reasons for undertaking a specific employment action. Unless corrected, the Eighth Circuit's interpretation will subject Chamber members to *per se* liability for employment discrimination, without a showing of discriminatory intent, any time reasons for employment actions are refuted. Thus, Chamber members have a fundamental interest in ensuring that the decision of the appellate court is reversed.

STATEMENT OF THE CASE

St. Mary's Honor Center is a correctional facility operated by the Missouri Department of Corrections. Melvin Hicks, an African-American, was employed by St. Mary's as a correctional officer. On several occasions, Hicks was disciplined, demoted, and eventually discharged by the supervisors at St. Mary's for violating a series of prison rules. Hicks brought a Title VII action against St. Mary's and a 42 U.S.C. § 1983 action against St. Mary's superintendent, Steven Long. Hicks alleged that his demotion and discharge were motivated by racial discrimination.

After a trial on the merits, the U.S. District Court for the District of Missouri found in favor of St. Mary's. The court analyzed Hicks' disparate treatment allegations under the proof model set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985). Using this model, the District Court determined that Hicks had established a *prima facie* case of racial discrimination, and that St. Mary's had articulated two legitimate, non-discriminatory reasons for Hicks' demotion and discharge. The court then held that Hicks had

established that the reasons for his discharge were a pretext for discrimination. The court, however, concluded that Hicks failed to meet his "ultimate burden" of proving that his demotion and discharge were racially motivated. Hicks failed, according to the court, because he had not established that his discharge was "racially" rather than "personally" motivated.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed the District Court's decision. The appellate court's ruling focused on the nature of evidence needed to establish pretext under the *McDonnell Douglas/Burdine* model. The court determined that once a plaintiff discredits an employer's alleged legitimate, nondiscriminatory reasons for his discharge, the plaintiff has satisfied his ultimate burden of establishing race discrimination. In doing so, the Eighth Circuit rejected the argument that, in addition to discrediting the employer's reasons for the discharge, the plaintiff must also offer some evidence that the discharge was *actually motivated by race*. St. Mary's then filed a petition for writ of *certiorari* with this Court.

ARGUMENT

INTRODUCTION

This Court is faced with a conflict concerning the order and allocation of proof in private, non-class actions alleging intentional employment discrimination. In the present case, the Court must clarify the definition of "pretext for discrimination" under the three-part model for disparate treatment cases articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985).[2] The Eighth Circuit erred in holding that

[2] Plaintiffs may use either direct or indirect evidence to establish a case of intentional discrimination. Since direct proof of discrimination is often difficult to find, most plaintiffs rely on indirect evidence to prove their case. In these cases, the courts use the burden of proof scheme established in *McDonnell Douglas/Burdine* to determine whether discrimination can be *inferred in the absence of direct evidence of discrimination.*

a plaintiff establishes "pretext" merely by proving that the employer's proffered explanations for discharge are untrue. Instead, this Court should recognize that a plaintiff—who retains the burden of proof at all times—must also produce some evidence of intentional discrimination in order to prevail in a disparate treatment action. Any other rule, the Chamber submits, would improperly shift the burden of proof to employers and would involve the federal courts in second-guessing the business judgment of employers.

I. THE EIGHTH CIRCUIT'S DECISION REPRESENTS A FUNDAMENTAL DEPARTURE FROM THE *McDONNELL DOUGLAS/BURDINE* ANALYSIS

In *McDonnell Douglas*, this Court set forth a three-step proof scheme for disparate treatment cases.[3] Under this scheme, the plaintiff in a Title VII action must carry the initial burden under the statute of establishing a *prima facie* case of discrimination.[4] If the plaintiff suc-

[3] There are two principal theories of discrimination: disparate treatment and disparate impact. Disparate treatment theory involves cases of differential treatment (intentional discrimination) of individuals based on race, color, sex, religion, national origin, or handicap. On the other hand, disparate impact theory focuses upon the alleged discriminatory effects of an otherwise neutral employment policy on a protected group of individuals. The present case involves an analysis of one aspect of disparate treatment theory. B. Schlei and P. Grossman, *Employment Discrimination Law* 1286-87 (1983).

[4] Under the *McDonnell Douglas* proof scheme, a *prima facie* case is established when the plaintiff shows the following: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and the employer continued to

cessfully establishes a *prima facie* case, the burden then shifts to the employer to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas* at 802. Once the employer articulates non-discriminatory reasons for the employment action, the plaintiff must show that the employer's stated reason for rejecting the plaintiff are a "pretext for discrimination." *Id.*

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1985), the Court refined the second-step of the *McDonnell Douglas* model. The Court determined that, once the *prima facie* case is established, the employer's burden is merely one of "production"—to state valid reasons for the employment action that dispel the notion of discrimination. The employer "need not persuade the court it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine* at 256. Once the employer carries this burden of production, "the presumption raised by the *prima facie* case is rebutted." *Id.*

More importantly, for purposes of this case, *Burdine* explicitly placed the burden of persuasion on plaintiffs in disparate treatment cases. The *Burdine* Court declared that the plaintiff must bear the *ultimate burden* of proving that the employer intentionally discriminated against the plaintiff. According to the Court, "the plaintiff retains the burden of persuasion . . . This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* To meet this burden, however, the Court determined that a plaintiff "may succeed either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

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seek applicants from persons of complainant's qualifications. 411 U.S. at 802.

employer's proffered explanation is unworthy of credence." *Id.*

Unfortunately, there is an inherent conflict between the Court's mandate in *Burdine* that plaintiffs maintain the ultimate burden of persuasion in disparate treatment cases, and the way in which the Court determined plaintiffs are to meet that burden. Plaintiffs cannot satisfy their ultimate burden simply by offering indirect evidence that demonstrates that the employer's articulated reasons for the discharge are untrue. Demonstrating pretext for discrimination means more than discrediting the reasons for taking a certain employment action. Other legitimate, albeit, unarticulated reasons may have influenced an employer's adverse employment action. In addition, the employer may have simply exercised poor business judgment in taking action. Plaintiffs must offer some evidence of discriminatory animus to satisfy their ultimate burden. To hold otherwise, would allow plaintiffs to prevail without offering evidence that reaches the core issue in question—whether the "real reasons" for the discharge were a *pretext for discrimination.*

The appellate courts have adhered to *Burdine's* mandate by placing the ultimate burden on the plaintiff to show that an employer's articulated reasons for the discharge are a pretext for discrimination. In *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1991), the court determined that "[i]n the final round of shifting burdens, it is up to the plaintiff, unassisted by the original presumption, to show that the employer's stated reason was but a pretext for age." To do this, the court held, a plaintiff must "do more than simply refute or cast doubt on the company's rationale for the adverse action. The plaintiff must also show a discriminatory animus based on age." 896 F.2d at 9. The First Circuit properly granted the employer's motion for summary judgment on the grounds that while the employer's reasons for the employment action were a sham, they were not a sham for age discrimination.

Similarly, in *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990), the court rejected an employee's allegations of race discrimination for failing to establish that his employer used "assaultive conduct" as a pretext for discrimination. According to the court, the plaintiff "cannot prove pretext solely by contesting the objective veracity" of the employer's reasons. 901 F.2d at 191. *See also, Menzel v. Western Auto Supply Company*, 848 F.2d 327 (1st Cir. 1988) (holding that plaintiffs must "disprove" the defendant's reasons by offering some evidence of discriminatory intent); *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991), *cert. denied* —— U.S. ——, 112 S.Ct. 181 (1991) ("the evidence *as a whole*, whether direct or indirect, must be sufficient for a reasonable factfinder to infer that the employer's decision was motivated by [discriminatory] animus." (emphasis in original)); *Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) ("If the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual and that the employment decision was based on a sexually-discriminatory criterion."); and *Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), *cert. denied* 483 U.S. 1006 (1987) ("the plaintiff has the ultimate burden of persuading the court that the reasons advanced . . . are a pretext and that a substantial or motivating factor in the defendant's decision was discrimination and but for that discrimination, the plaintiff would have been appointed").

Based on the language in these cases, and from this Court's decision in *Burdine*, the Eighth Circuit's interpretation of how to demonstrate "pretext for discrimination" is obviously incorrect. The lower court never reached the critical question of whether the employer evidenced *discriminatory* animus in discharging the plaintiff. Instead, the court held the employer *per se* liable for race

discrimination once the plaintiff discredited the employer's proffered reasons for the discharge. Thus, the Eighth Circuit's decision shifted the ultimate burden of persuasion to employers to prove that there was no intentional discrimination. This result clearly conflicts with this Court's decision in *Burdine* and must be overruled.

II. UNLESS THE LOWER COURT'S DECISION IS OVERTURNED, ALL ERRORS IN MANAGERIAL DISCRETION WILL BECOME ACTIONABLE UNDER THE FEDERAL ANTI-DISCRIMINATION LAWS

Employers are generally free to discharge, promote, or demote individuals for any reason, fair or unfair, so long as the decision is not a mask for discrimination.[5] The federal anti-discrimination laws were not designed to provide a forum for disgruntled employees to voice their objections over legitimate employment practices. Nor did these laws intend the federal court system to become a "super-personnel board" which bears the burden of second-guessing whether an employer's decisions were "just" or "proper." Yet, the Eighth Circuit's decision leads to this result because it allows plaintiffs to ultimately prevail in discrimination actions without establishing a nexus between the discharge and conduct prohibited by Title VII.[6]

Employers make both good and bad personnel decisions. Some decisions are based on objective factors, like test scores or seniority privileges, that are easy to quantify.

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[5] Of course, employers do not have unlimited discretion in hiring and firing employees. Various state laws, such as those concerning wrongful discharge, protect employees from unjust employment actions.

[6] The *McDonnell Douglas/Burdine* proof model does not exclusively apply to cases involving racial discrimination. The proof scheme also applies to cases brought under the Age Discrimination in Employment Act, and 42 U.S.C. §§ 1981 and 1983.

Other decisions are based on subjective factors involving the exercise of "managerial discretion." These decisions may involve determinations that an employee "is not a team-player," or "does not have leadership ability." In some instances, the employer may simply favor one employee over another. While these employment practices may be unfair, or even wrong, they are not necessarily discriminatory. Not all so-called "errors in managerial discretion" involve conduct prohibited by Title VII. Yet unless plaintiffs are required to establish a nexus between employer action and prohibited conduct, all "bad business decisions" will become actionable under the federal anti-discrimination laws.

The case law is replete with examples of subjective business decisions that the anti-discrimination laws simply do not address. In *Keyes v. Secretary of the Navy*, 853 F.2d 1016 (1st Cir. 1988), the First Circuit specifically stated:

> Title VII does not presume to obliterate all manner of inequity, or to stanch, once and for all, what a Scottish poet, two centuries ago termed '[m]an's inhumanity to man.' What counts for purposes of a suit such as this is whether or not some specially protected quality—say race, or gender—has been implicated. 853 F.2d at 1026.

There, the court refused to find discrimination when a black woman sued the Navy for hiring a white male for a civilian post instead of her. Even though the plaintiff introduced evidence of "garden-variety cronyism," the court held that she did not meet her ultimate burden of showing that the favoritism was a pretext for discrimination since objective test scores indicated that both individuals were qualified for the position. The court emphasized that the plaintiff bears the burden "not only to show that the defendant's proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts *aimed at masking sex or race discrimination.*" *Id.* (emphasis in original).

The court similarly noted, in *Freeman v. Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988), that "good-faith errors in an employer's business judgment are not the stuff of ADEA transgressions." 865 F.2d at 1341. Plaintiffs must show more than the employer made a "business miscalculation" to satisfy the burden of persuasion in the case. Recognizing that employers sometimes make unwise business decisions, act with ill will, or act arbitrarily, the *Freeman* court—unlike the Eighth Circuit below—had no trouble distinguishing this type of transgression from a situation which is actionable under the federal anti-discrimination laws.

Moreover, in *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987), the court held that "[s]howing that the employer dissembled is not necessarily the same as showing 'pretext for discrimination' . . . it may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement." The employer, Rea Magnet Wire Company, fired a black employee because it honestly believed the employee had called in sick to attend a body-building contest. In fact, the employee had actually suffered an ankle injury, but had not provided the employer with a physician's note to explain his absence. The court determined that although the employer did not actually have good cause to fire the plaintiff, the employer's actions were not a pretext for discrimination. According to the court, "[A] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." *Id.*

In the present case, the District Court also properly recognized that an employer's subjective reasons for discharging of an employee, may not necessarily be actionable under Title VII. Here, although the plaintiff had produced evidence of a plan to terminate him, he could produce no evidence that the plan was "racially rather

than personally motivated." *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991). Thus, the court quite correctly found no discrimination since the plaintiff could not draw a nexus between the employer's conduct and conduct prohibited by the federal anti-discrimination laws.

The fundamental flaw in the Eighth Circuit's decision is its failure to distinguish between acts of intentional discrimination and simple errors in business judgment by an employer. Under the Eighth Circuit's analysis, plaintiffs can discredit an employer's reasons for the discharge—and ultimately prevail in a discrimination action—without establishing a connection between the discharge and conduct prohibited by Title VII. In the end, such a standard subjects each and every exercise of managerial discretion to Title VII liability.

III. THE EIGHTH CIRCUIT'S RULING VIRTUALLY ELIMINATES SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

The Eighth Circuit's ruling thwarts the effective use of summary judgment in employment discrimination litigation. This Court has acknowledged the important and effective role summary judgment plays as a means of eliminating groundless claims and avoiding the time and expense of trial.[7] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Eighth Circuit's decision—which permits plaintiffs to go to trial without adducing any evidence of discrimination—completely eviscerates the use of the summary judgment motion.

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[7] The Civil Rights Act of 1991, which became effective on November 21, 1991, made compensatory and punitive damages, and jury trials available in cases of intentional discrimination. 42 U.S.C. § 1981. By adding these provisions, the Act significantly increased the costs associated with employment litigation.

The following example illustrates the Chamber's argument. Assume a company decides to discharge the "manager" of its accounting department. The individual in question (the plaintiff) is an Asian male. The basis for the plaintiff's discharge is poor performance. However, to avoid an unpleasant confrontation and spare the plaintiff's "feelings," the employer tells the plaintiff that he is being discharged because he is not a "team player," and he "can't get along" with the staff of his department.

The plaintiff sues the company for race discrimination under Title VII. In response, the company files a motion for summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure. This motion asserts that there are no issues of material fact, and that the company is entitled to judgment as a matter of law. The company attaches affidavits to the motion explaining its stated reasons for discharging the plaintiff.

The plaintiff responds to the company's motion. He asserts that he was a "team player" and that his staff had never complained that he was difficult to work with. He supports his position with affidavits from his co-workers and staff. However, he offers no evidence that race motivated the discharge.

The court denies the company's motion for summary judgment on the grounds that the employer failed to show that there were no issues of material fact that entitled it to a judgment as a matter of law. The case then proceeds to trial.

This example demonstrates the practical difficulties presented by the Eighth Circuit's decision. In this illustration, the plaintiff defeated a motion for summary judgment by establishing that the employer lied about the true reasons for his discharge. This "lie" became tantamount to race discrimination without the plaintiff ever having established that race factored into the employer's decision. The plaintiff merely discredited the employer's

reasons for his discharge, and, with this, created a factual dispute for trial. The employer's "business decision" to avoid confrontation with the plaintiff at the time of discharge, in essence, was enough to establish "pretext for discrimination." This result, the Chamber argues, undercuts this Court's decisions in *Celotex*, *Anderson* and *Matsushita*, and should not be allowed to stand.

By eliminating the use of summary judgment as a just and speedy method of adjudicating claims, the Eighth Circuit's decision will undoubtedly contribute to the flood of discrimination claims in the federal court system. As of September 30, 1992, there were 10,771 private employment-related civil rights actions pending in the federal courts.[8] In 1991, there were only 8,370 such cases pending in the federal court system. *Id.* This represents an increase of 28.7% over a one-year period. Without the benefit of summary judgment motions to help reduce this backlog, the federal court system's caseload will continue to grow at incremental rates.

The Eighth Circuit's interpretation of the *McDonnell Douglas/Burdine* "pretext for discrimination" language will lead to far more trials, far higher settlement costs, and far higher defense costs. Employers will be severely hindered when defending disparate treatment cases, and will have their available options and litigation strategy restricted.

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[8] Report of the Office of the Administrative Office of the United States Courts, Table C-2A (Sept. 30, 1988 through Sept. 30, 1992).

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the decision of the Eighth Circuit be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG *
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
* Counsel of Record

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